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IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF DELAWARE

Civil Action No. 337.

JOHN J. CASALE, INC.,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Defendants.

JURISDICTIONAL STATEMENT UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

(Filed January 14, 1944.)

John J. Casale, Inc., plaintiff-appellant herein, presents the following statement as the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the final decree of December 21, 1943, in the above-entitled cause sought to be reviewed.

A. Statutory Provisions.

The statutory provisions believed to sustain the jurisdiction of the Supreme Court are 28 U. S. C., Secs. 47(a), 345, 7 F. C. A. Title 28, Sec. 47(a), 8 F. C. A. Title 28, Sec. 345.

B. Date of the Decree Sought to Be Reviewed and Date Upon Which the Application for Appeal Was Presented.

The decree sought to be reviewed was entered December 21, 1943. The petition for appeal, together with the assignment of errors, was presented January 14, 1944, and allowed January 17, 1944.

C. Nature of the Cause and the Rulings Below.

This is an appeal from a decree of the District Court of the United States for the District of Delaware, entered December 21, 1943, dismissing an action instituted by John J. Casale, Inc., a Delaware corporation, against the United States of America and Interstate Commerce Commission for the purpose of setting aside a final order of Division 3 of that Commission dated April 8, 1943, and affirmed by the full Commission membership on August 2, 1943, denying the petition of John J. Casale, Inc., to withdraw and for that reason to dismiss, its previously filed and undisposed of application to the Commission for a contract carrier permit or for a common carrier certificate of public convenience and necessity to transport as a carrier for hire by motor vehicle property in interstate and foreign commerce. In denying such petition for withdrawal and refusing to dismiss the application because of such petition for withdrawal the Commission did not make any findings whatsoever.

The Court below held that the action of plaintiff-appellant to set aside such denial order of the Commission and for affirmative judicial relief compelling the Commission to allow withdrawal, is premature and beyond the jurisdiction of the United States District Court for the reason that the Interstate Commerce Commission may not, in its final consideration and decision on the "grandfather" applica-

tion, determine John J. Casale, Inc., to be a carrier for hire. It was said in the Court's opinion that should the Commission deny the Casale application for a common carrier certificate, or in the alternative a contract carrier permit, on the ground that John J. Casale, Inc., is not a motor carrier for hire entitled to such certificate or permit, then no harm will have been done by the refusal to permit the application for such certificate or permit to be withdrawn. If, however (it was added by the Court), it should be concluded by the Commission that John J. Casale, Inc., is a carrier for hire and accordingly a permissive certificate or permit should be issued in its favor by the Commission, then that John J. Casale, Inc., would be entitled to institute a new action in the United States District Court for the District of Delaware to set aside such permissive order of the Commission on the ground that before entering its order the Commission should have allowed the application to be withdrawn.

The Court declared that there was present a "strong" case for the right of John J. Casale, Inc., to withdraw its application to the Commission under the authority of *Jones* v. *Securities & Exchange Commission*, 298 U. S. 1, but that the District Court is presently barred from according relief on the authority of *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125.

The question therefore presented by this appeal is a substantial one. It involves the substantive duty of the Interstate Commerce Commission, upon petition to it to that effect, to allow a grandfather applicant to withdraw its application to the Commission before final action of the Commission on the application. It furth[illegible]volves the power of the United States District Court, when the Commission has refused to permit such withdrawal, to set aside the Commission's denial order and affirmatively to compel the Commission to allow the withdrawal. Since in the majority decision of the Supreme Court of the United States

in *Jones* v. *Securities & Exchange Commission* the right of withdrawal of a permissive application was held to be a substantive one, the question here is whether the Commission's refusal to permit such withdrawal, before its final action on the application, is reviewable by the U. S. Statutory District Court.

The judgment of the U. S. District Court is a final one as far as that Court is concerned.

D. Cases Sustaining the Supreme Court's Jurisdiction on Direct Appeal.

U. S. v. *B. & O. R. R. Co.*, 293 U. S. 454;
I. C. C. v. *Railway Labor Executives*, 315 U. S. 373.

E. Decree and Opinion of the District Court.

Appended to this statement is a copy of the opinion of the District Court and the final decree of the District Court sought to be reviewed. There were no separate findings of fact or conclusions of law made and entered by the District Court.

Plaintiff-appellant, therefore, respectfully submits that the Supreme Court of the United States has jurisdiction of the appeal.

Dated January 14, 1944.

(S.) CHARLES E. COTTERILL,
Attorney for Plaintiff-Appellant.

APPENDIX "A".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE.

Civil Action No. 337

JOHN J. CASALE, INC., *Plaintiff*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*.

Opinion.

Before Biggs and Goodrich, Circuit Judges and Leahy, District Judge, Sitting Pursuant to the Urgent Deficiencies Act of October 22, 1913, 28 U. S. C. (1940 Ed.) § 47.

(S.) GOODRICH, *Circuit Judge:*

The plaintiff, John J. Casale, Inc., hereafter called Casale, invokes the aid of a three judge court under the provisions of the Urgent Deficiencies Act of October 22, 1913, 28 U. S. C. (1940 Ed.) § 47. The facts, which have been stipulated by the parties may be briefly summarized as follows:

In 1936 Casale applied to the Interstate Commerce Commission for a "grandfather" certificate as a contract carrier as provided in the statute. 49 U. S. C. (1940 Ed.) § 309. In the application the plaintiff stated that while it carried some freight under contract its chief business was leasing trucking equipment. In 1939 Casale filed a motion to dismiss its application conditioned upon the Commission's making an entry that its rental business would not be subject to the Motor Carrier Act. In 1941 a hearing was had before a Commission examiner. Plaintiff's counsel stated on the record that Casale had already abandoned its contract carrier business and was devoting itself entirely to the leasing of trucking equipment. Evidence was offered regarding the details of plaintiff's leasing business. Subsequently, in 1941, the examiner filed a recommended

report finding that the plaintiff was engaged only in the rental business and that such business did not constitute carriage subject to the Motor Carrier statute. In 1942 the Commission, upon its own motion reopened the proceedings. Two further hearings were held before an examiner. In 1943, at the last hearing, the plaintiff's counsel asked for an unconditional dismissal of the application. This motion was denied, first by Division 5 of the Commission and subsequently by the entire Commission.

It is the denial of this motion to dismiss of which the plaintiff complains. It asks that the order of the Interstate Commerce Commission be set aside, that the Commission be enjoined from proceeding further in respect to such application and that an order be entered requiring the Commission to permit withdrawal of the application and granting the motion to dismiss.

Two questions were argued before us. One had to do with whether the denial of the motion to dismiss was proper. Casale urges that it was not, that it has a right to ask for dismissal at any time prior to the final termination of the proceedings and makes a strong argument based upon the majority opinion in Jones *v.* Securities & Exchange Commission, 298 U. S. 1 (1936). In support of its decision, counsel for the Interstate Commerce Commission and the United States point out distinctions between the situation presented here and that in the Jones case. The question is interesting and not without difficulty. We think we do not get to it as this case comes before the Court.

The reason we do not get to the question noted above is because we think the plaintiff's appeal for court help is premature. Judicial aid is invoked because of the provision of the Urgent Deficiencies Act cited above. That statute does not say, in so many words, what constitutes, for purposes of judicial review, "any order" made or entered by the Interstate Commerce Commission. But the Supreme Court has, in an illuminating group of decisions, given us guidance in determining under what circumstances judicial review may be called for. The most complete discussion is that found in Rochester Telephone Corp. *v.* United States, 307 U. S. 125 (1939). The Court lists several

s of Commission action in which judicial review was
ed. Its first is "Where the action sought to be re-
ed may have the effect of forbidding or compelling
luct on the part of the person seeking to review it, but
if some further action is taken by the Commission."
129) In such cases, says the Court, "In view of tra-
nal conceptions of federal judicial power, resort to the
ts • • • is either premature or wholly beyond their
ince" (p. 130). Examples cited are orders of the
mission setting a case for hearing despite a challenge
risdiction, United States *v.* Illinois Central Railroad
pany, 244 U. S. 82 (1917), rendering a tentative valua-
under the Valuation Act, The Delaware and Hudson
pany *v.* United States, 266 U. S. 438 (1925), or even a
valuation thereunder, United States *v.* Los Angeles &
Lake Railroad Company, 273 U. S. 299 (1927). While
discussion by the Court in the Rochester case was
arily concerned with clearing up the confusion in the
"negative orders" the classification just recited as
of the instances where court review is unavailable was
e evidently approved as well as decisions cited as in-
ces thereof.

'e think the instant case falls clearly within the classifi-
on just discussed. The case in which Casale began as
ntiff has been heard and the evidence submitted and re-
ed. A denial of the motion to dismiss does not call
n the plaintiff for anything more, forbid it to do any-
g or put it under any burden while the case is in the lap
he Commission. The situation seems to be perfectly
cribed by the language used by the Court in United
es *v.* Los Angeles & Salt Lake Railroad Company,
ra. "The so-called order here complained of is one
ch does not command the carrier to do, or refrain from
g, any thing; which does not grant or withhold any
nority, privilege or license; which does not extend or
dge any power or facility; which does not subject the
ier to any liability, civil or criminal; which does not
nge the carrier's existing or future status or condition;
ch does not determine any right or obligation" (pp.
310).

Neither the plaintiff nor this Court knows what the order of the Interstate Commerce Commission will be at the conclusion of the consideration of the case before it. If the order accords with what the plaintiff wants, obviously it has not been hurt by the Commission's refusal to dismiss. If the order goes against the plaintiff's desires and it feels aggrieved thereby, court review is open to it on the merits which will include the question of whether it has a substantive right to have its petition dismissed at its pleasure after hearings have taken place. But, at the present stage of the litigation, we are clear that the plaintiff is not entitled to relief from this Court. The prayer of the petitioner is denied; the defendants may submit a decree.